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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY ET AL.,

Petitioners,

v.

AMY ROWLEY ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE MARYLAND ADVOCACY UNIT FOR THE DEVELOPMENTALLY DISABLED, INC. AND THE PRINCE GEORGE'S COUNTY COALITION FOR THE HANDICAPPED, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CURTIS L. DECKER
WINIFRED DE PALMA
MARYLAND ADVOCACY UNIT FOR THE DEVELOPMENTALLY DISABLED, INC.
2616 Maryland Avenue
Baltimore, Maryland 21218

RALPH J. MOORE, JR.
(Counsel of Record)
FRANKLIN D. KRAMER
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
Counsel for Amici Curiae

January 30, 1982

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. § 615 OF THE EHA CREATES AN EXPRESS PRIVATE RIGHT OF ACTION TO ENFORCE THE RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION, AND ALLOWS JUDICIAL DETERMINATION OF THE ADEQUACY OF THE PARTICULAR SERVICES INCLUDED IN A CHILD'S INDIVIDUALIZED EDUCATION PROGRAM ("IEP")	4
II. THE HOLDING BELOW DOES NOT EXPOSE PETITIONERS TO "UNLIMITED LIABILITY"	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: Page

Anderson v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981) 8
Battle v. *Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom., Scanlon* v. *Battle*, 49 U.S.L.W. 3954 (June 22, 1981) 3, 8, 11
Ezratty v. *Puerto Rico*, 648 F.2d 770 (1st Cir. 1981) 8
Kruelle v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981) 8
Springdale School District v. *Grace*, 656 F.2d 300 (8th Cir. 1981) 8
Tatro v. *Texas*, 625 F.2d 557 (5th Cir. 1980) 8
Tokarcik v. *Forest Hills School District*, Nos. 80-2844, 80-2845 (3d Cir. Sept. 8, 1981) 8

Statutes:

Education of the Handicapped Act, *as amended*:

20 U.S.C. § 1401(16) (1976) 6, 8
20 U.S.C. § 1401(17) (1976) 6, 8
20 U.S.C. § 1401(18) (1976) 6, 8
20 U.S.C. § 1401(19) (1976) 6
20 U.S.C. § 1412 (1976) 5, 10, 11
20 U.S.C. § 1413 (1976) 10, 11
20 U.S.C. § 1414 (1976) 6
20 U.S.C. § 1415 (1976) ..... *passim*
20 U.S.C. § 1416 (1976) 10

Legislative History:

H.R. Rep. No. 94-332, 94th Cong., 1st Sess. (1975) .. 5
S. Rep. No. 94-455, 94th Cong., 1st Sess. (1975) 5
121 Cong. Rec. S20430 (daily ed. Nov. 19, 1975) 7
121 Cong. Rec. S20432 (daily ed. Nov. 19, 1975) 7

Other Authority:

Helping Children With Handicapping Conditions in New York State: the New York State Plan Submitted Under the Education for All Handicapped Children Act, Final 1980-81 9

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INTEREST OF *AMICI CURIAE*

The Maryland Advocacy Unit for the Developmentally Disabled, Inc. (MAUDD) is an independent non-profit agency which has been designated by the Governor of Maryland as the State's Protection and Advocacy System. MAUDD is responsible for providing protection and advocacy services to Maryland's developmentally disabled

persons, including school age persons. It has actively represented numerous handicapped children and their families in proceedings under § 615 of the Education of the Handicapped Act as amended by the Education for All Handicapped Children Act of 1975 (P.L. 94-142), 20 U.S.C. §§ 1401-1420, and in litigation involving rights under the Act.

The Prince George's County Coalition for the Handicapped, Inc., is an organization with 30 member groups active in advocacy in Prince George's County, Maryland, on behalf of children and adults with virtually all disabilities. It and its members have actively participated in securing the establishment of laws, regulations and practices in Maryland to implement the policies and requirements of the Act.

These organizations and the disabled children and families they serve are directly affected by the issues involved in this case. They are vitally interested in maintaining the right of each handicapped child under the Act to a free appropriate public education.

SUMMARY OF ARGUMENT

1. Section 615 of the Education of the Handicapped Act, as amended in 1975 by P.L. 94-142, establishes an express private right of action to a judicial determination, based on the preponderance of the evidence, of any complaint with respect to "any matter relating to * * * the provision of a free appropriate public education" for handicapped children. Under the statutory definition of "free appropriate public education" and the terms "special education" and "related services" used in that definition, the right of review under § 615 includes the right to a determination of any dispute regarding the services to be provided in a child's individualized education program (IEP) to give him an appropriate education. The legislative history confirms explicitly that this is what

Congress intended. Four different courts of appeals have so concluded; there is no case to the contrary. Petitioners' claim that the Act did not establish an enforceable right to a free public education is untenable.

2. The holding below does not "challenge" the New York State Plan or expose petitioners to "unlimited liability." The New York plan does not purport to list or identify particular services or disclose restrictions regarding their provision. The local district's refusal to provide an interpreter for Amy Rowley is not based on any disclosed rule or policy, but on an ad hoc determination made with respect to this case. If petitioners are right in their contention that silence in the state plan about a particular service forecloses any claim under § 615 that such a service is required in a child's IEP to provide him an appropriate education, the review provisions of the Act would be nullified. For instance, in New York the state plan is silent with respect to virtually all specific services, and thus none could be claimed under § 615. This is contrary to Congress' objectives.

That does not mean that States are exposed to "unlimited liability" under the Act. Restrictions on the provision of particular services should be disclosed in the state plan itself, so that the Secretary of Education can determine whether they are consistent with the statutory obligation to provide a free appropriate education to each individual child. If the Secretary's determination is adverse to the State, the State is entitled to judicial review. The State may decide whether to accept funding under the required conditions. But "where an inflexible rule [denying service without regard to individual need] has not been afforded this consideration it must certainly fall." *Battle* v. *Pennsylvania*, 629 F.2d 269, 280-281 (3d Cir. 1980), *cert. denied sub. nom. Scanlon* v. *Battle*, 49 U.S.L.W. 3954 (June 22, 1981). An ad hoc rule fashioned for a particular child, only to prevent review under § 615, is even less defensible.

ARGUMENT

Most issues involved in this case will be adequately briefed by others.[1] Therefore, these amici will not burden the Court with an extended discussion. There are two matters, however, that deserve elaboration, which we discuss in this brief. They concern the nature of administrative and judicial review under § 615 of the Education of the Handicapped Act ("EHA"), as amended, and petitioners' unfounded claim that the decision below exposes them to "unlimited liability." (Pet. Br. at 47).

I. § 615 OF THE EHA CREATES AN EXPRESS PRIVATE RIGHT OF ACTION TO ENFORCE THE RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION, AND ALLOWS JUDICIAL DETERMINATION OF THE ADEQUACY OF THE PARTICULAR SERVICES INCLUDED IN A CHILD'S INDIVIDUALIZED EDUCATION PROGRAM ("IEP").

Section 615(e) of the EHA provides that any party aggrieved "by the findings and decision" of administrative hearing officers in "due process" hearings under § 615 "shall have the right to bring a civil action with respect to the *complaint presented pursuant to this section* * * *." 20 U.S.C. § 1415(e)(2) (1976) (emphasis added).[2] The phrase "complaint presented pursuant to

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[1] In particular, we have reviewed the briefs filed by the *amici* National Association of the Deaf et al., and the Association for Retared Citizens of the United States et al., which thoroughly analyze the issues covered therein.

[2] In such an action "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). These provisions were added to the bill, enacted as P.L. 94-142 in 1975, by the Conference Committee. The House bill, like the final legislation, provided for administrative hearings to review individual children's programs, because the House had concluded that "[i]t is clear that a federally-mandated grievance-compliance mechanism is essential of any fur-

this section" refers to subsection (b)(1), which provides that "the procedures required by this section shall include, but shall not be limited to * * * an opportunity to present *complaints* with respect to *any matter*[3] *relating to* the identification, evaluation, or educational placement of the child, or *the provision of a free appropriate public education to such child.*" 20 U.S.C. § 1415(b)(1)(E) (emphasis added). Thus, there is a right to judicial review regarding "any matter relating to * * * the provision of a free appropriate public education."

The phrase "any matter relating to * * * the provision of a free appropriate public education" refers to other provisions in the Act concerning "free appropriate public education." These provisions—which make "free appropriate public education" a "right" of each handicapped child and a "requirement" which must be provided as a "condition" of funding (20 U.S.C. § 1412 (1), (2), (5), (6))—define "free appropriate public education" as "special education" and "related services" which, in addition to being provided without charge, under public direction,

> "(B) meet the standards of the State educational agency,

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ther meaningful progress is to be made in serving the needs of handicapped children." H.R. Rep. No. 94-332, 94th Cong., 1st Sess. 14 (1975). The House bill, however, would have provided judicial review in which the findings of fact of the State educational agency would have been "conclusive if supported by substantial evidence" and also would have provided for remand for the taking of additional evidence. Joint Explanatory Statement of the Conference Committee, S. Rep. No. 94-455, 94th Cong., 1st Sess. 47-48 (1975). The conference substitute provided instead that the court should take additional evidence at the request of a party and that the decision would be based on the preponderance of the evidence. *Id.* at 47-50.

[3] The conference committee emphasized the broad scope of this provision by italicizing the phrase *"any matter"* in its discussion of this provision. S. Rep. No. 94-455, 94th Cong., 1st Sess. 48-49 (1975).

"(C) include an appropriate preschool, elementary or secondary school education in the State involved, and,

"(D) *are provided in conformity with the individualized education program* required under section 1414(a)(5)." 20 U.S.C. § 1401(18) (emphasis added).

Accordingly, the right to judicial review encompasses review of the individualized education program.

The required "individualized education program" ("IEP") must be in writing and must be developed and revised at least annually for each handicapped child at a "meeting" of the child's parents or guardian, the child's teacher, a representative of the educational unit, and the child himself where appropriate. 20 U.S.C. §§ 1401(19) & 1414(a)(5). It must include (A) a statement of the child's "present levels of educational performance," (B) a statement of "annual goals" and "short-term instructional objectives," (C) a statement of "*the specific educational services to be provided to such child*," (D) projected dates for initiation and duration of service, and (E) evaluation criteria and procedures. 20 U.S.C. § 1401(19) (emphasis added).

The nature of the "specific services" required in the IEP is stated in the statutory definitions of "special education" and "related services" which are part of the statutory definition of "free appropriate public education" in § 601(18). "[S]pecial education" means "specially designed instruction * * * *to meet the unique needs of a handicapped child*," and "related services" is defined as "transportation, and *such* developmental, corrective, and *other supportive services* * * * *as may be required to assist a handicapped child to benefit from special education* * * *." 20 U.S.C. § 1401(16), (17) (emphasis added).

Thus, disputes as to the "specific services" which must be included in the child's IEP to provide the child with "free appropriate public education"—a "right" upon

which federal funding is conditioned—are clearly within the scope of the "complaints" which are the subject of §615 and judicial review thereunder, *i.e.*, "complaints with respect to any matter relating to * * * the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). Under § 615, courts can and must determine what services are necessary in a particular child's IEP to assure that the child receives the mandated "free appropriate public education."

The legislative history of the conference substitute which was enacted as § 615 explicitly confirms this conclusion. Senator Williams—a chief sponsor of the bill, committee chairman, and floor manager responsible for the legislation in the Senate—explained § 615 on the floor of the Senate. He stated that in addition to dealing with disputes about evaluation and placement, the section would allow a parent to "present a complaint alleging that a state or local education agency *has refused to provide services* to which a child may be entitled * * *."[4] 121 Cong. Rec. S20432 (daily ed. Nov. 19, 1975) (emphasis added). Moreover, the Senator stressed that "the language referring to 'free appropriate education' has been adopted to make clear that a complaint may involve matters such as *questions respecting a child's individualized education program * * * or any other question within the scope of the definition of 'free appropriate public education.'*" *Id.* (emphasis added). He also stated that "handicapped children and their parents are provided these protections in all matters relating to their identification, evaluation and placement, and in the provision of a free appropriate public education." *Id.* at S20430.

The legislative history therefore confirms that Congress intended review under § 615 of "*any matter*" relating to the provision of a "free appropriate public education,"

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[4] The services to which the child "may be entitled," as we have seen, means the services necessary to provide him with a free appropriate public education as defined in the statute, *i.e.*, one "specially designed" to meet his "unique needs."

including a refusal to provide particular services as part of a child's IEP. Every court that has had occasion to decide the matter has so ruled, including federal courts of appeals for four different circuits—the Second, in this case, and the Third,[5] Fifth,[6] and Seventh.[7] Petitioners' contention that Congress did not create individually enforceable rights in this regard (Pet. Br. at 24, 28, 30, 31, 34) is simply not tenable.

II. THE HOLDING BELOW DOES NOT EXPOSE PETITIONERS TO "UNLIMITED LIABILITY."

Petitioners contend both that the complaint in this case "challenged" New York's State Plan because the plan neither requires nor forbids provision of sign language interpreters—it is silent about this service—and that if the decision below is correct "Congress has created a scheme of unlimited liability for the states and local school districts." (Pet. Br. at 42-43, 46-47). They are not correct on either score.

As we have seen, the EHA defines "free appropriate public education" to mean, among other things, "specially designed instruction * * * to meet the unique needs of a handicapped child," and "such developmental, corrective, and other supportive services * * * as may be required to assist a handicapped child to benefit from special education * * *." 20 U.S.C. § 1401(16), (17), (18). A great many different services may be necessary to satisfy these statutory criteria and provide different children with an appropriate education. What services must be provided

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[5] *Tokarcik* v. *Forest Hills School Dist.*, Nos. 80-2844 & 80-2845, slip. op. (3d Cir. Sept. 8, 1981); *Kruelle* v. *New Castle County School Dist.*, 642 F.2d 687, 692-96 (3d Cir. 1981); *Battle* v. *Pennsylvania*, *supra*, 629 F.2d at 280-81.

[6] *Tatro* v. *Texas*, 625 F.2d 557, 561-64 (5th Cir. 1980).

[7] *Anderson* v. *Thompson*, 658 F.2d 1205, 1211, 1217 (7th Cir. 1981). *See also Springdale School Dist.* v. *Grace*, 656 F.2d 300 (8th Cir. 1981); *Ezratty* v. *Puerto Rico*, 648 F.2d 770 (1st Cir. 1981).

in each individual case is what the IEP and § 615 review procedures are all about.

The New York State Plan [8] does not purport to list or identify particular services, much less announce what restrictions the State or local districts do or may impose on their provision. The plan is silent about these matters. So far as appears on the face of the plan, they are left entirely for determination in the child's IEP, subject to administrative and judicial review under § 615, in which, as the plan itself states, parents may "challenge * * * any matter related to" initiation of or change in "the provision of a free appropriate public education for [the] child, or the refusal to make such changes." (Plan at 83-84).

Moreover, petitioners do not claim that they have any announced rule that purports to restrict the provision of a sign language interpreter, if participants in IEP meetings or hearing officers or courts in proceedings under § 615 deem one necessary to provide a particular child with education suited to his unique needs. The petitioner school district did not tell the hearing officers who heard this case or either court below about any such rule. Indeed, it is clear that no such rule exists, because the district itself experimented with the provision of a sign language interpreter for Amy Rowley. The rule, or policy, or whatever it is, that supposedly justifies the denial of an interpreter for Amy is one announced only in briefs filed in this Court, appears applicable to this case only, and reflects only petitioners' decision in this case to resist the provision of a sign language interpreter for Amy.

If petitioners are right—that the silence of the state plan about a particular service means that a local district

[8] Petitioners have failed to put the plan in the record, but we have examined *Helping Children With Handicapping Conditions in New York State: The New York State Plan Submitted Under The Education for All Handicapped Children Act, Final 1980-81* (hereinafter cited as "Plan"). Statements in this brief are based on that plan.

may refuse to provide that service based on ad hoc determinations that are not substantively reviewable under § 615—then almost no service can be required under § 615 if the State chooses, as has New York, not to discuss particular services in its plan. Such a conclusion would gut the Act; the IEP and review procedures of the EHA would be meaningless. Contrary to Senator Williams' statements, a refusal "to provide services" and "questions respecting a child's individualized education program" would *not* be reviewable. This position is wholly inconsistent with the plain words of § 615, and, as shown above, is not what Congress intended when formulating the administrative and judicial review proceedings provided by that section.

That does not mean, however, that the States are exposed to "unlimited liability." To be sure, as other amici demonstrate, Congress required a substantially increased commitment of resources by the States as a condition of federal funding. But as petitioners themselves demonstrate (Pet. Br. at 42-43), the Act provides them ample protection. The state should disclose any rules restricting the availability of services *in the state plan itself*—not in briefs filed in this Court. Whether the restriction is consistent with the statutory obligation to provide a free appropriate public education to all handicapped children can then be reviewed by the United States Secretary of Education. If the restriction is reasonably consistent with the statutory obligation, the Secretary will approve the plan and authorize funding. 20 U.S.C. §§ 1412-13. On the other hand, if the restriction would prevent the provision of an appropriate education in *some* individual cases, and therefore would be inconsistent with the statutory obligation to provide appropriate education for *all* handicapped children, the Secretary is required to disapprove the plan and withhold funding. 20 U.S.C. § 1416. The State is entitled to judicial review of this determination. *Id.* The State is free to determine whether to accept funds on the required terms and conditions, or whether instead to refuse such funds, as we

understand New Mexico has done. Under the Act, then, there is no problem of lack of notice to the State, and there is no question of "unlimited liability."

In short, the Act provides ample protection for petitioners' concerns about allocation of resources. As one court of appeals has said, "the Act contemplates that reasonable educational standards may be set by the states." *Battle* v. *Pennsylvania*, *supra*, 629 F.2d at 280. But "in promulgating these standards, the Act contemplates review and approval by the Commissioner of Education" [9] under 20 U.S.C. § 1413(c), "as well as procedural safeguards, including public notice and comment." *Id.*; 20 U.S.C. § 1412(7), (13). "In this way the Act assures that any state standard will be filtered through both the state educational agency, with its expertise and sensitivity to both educational and fiscal matters, the Commissioner of Education, with his expertise, and the general public." *Battle* v. *Pennsylvania*, *supra*, 629 F.2d at 280-81. But "where an inflexible rule [denying service without regard to individual educational needs] has not been afforded this consideration it certainly must fall." *Id.* at 281. An ad hoc rule fashioned for a particular child, only to prevent review under § 615, is even less defensible.

CONCLUSION

The decision below should be affirmed, or for reasons stated in the brief of the National Association of the Deaf et al., *amici curiae*, the writ of certiorari should be dismissed.

Respectfully submitted,

CURTIS L. DECKER
WINIFRED DE PALMA
MARYLAND ADVOCACY UNIT FOR THE DEVELOPMENTALLY DISABLED, INC.
2616 Maryland Avenue
Baltimore, Maryland 21218

RALPH J. MOORE, JR.
(Counsel of Record)
FRANKLIN D. KRAMER
JAMES E. KAPLAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
Counsel for Amici Curiae

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[9] Now the Secretary of Education.